

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Ripple Kids Inc.

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Serial No. 77492885 and 77493208

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Julie L. Dalke of Latham & Watkins LLP, for Ripple Kids Inc.

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Before Holtzman, Cataldo, and Ritchie, Administrative Trademark  
Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Ripple Kids Inc. ("applicant") filed an application to register the mark RIPPLE KIDS, in standard character format, for goods identified as "stationery and writing materials, namely, blank writing journals, notebooks, address books, daily planners, stickers, bookmarks, folders, pencils, pens, pencil cases, pencil boxes, printed award certificates, letterhead paper, business cards, postcards" in International Class 16; and "clothing and apparel, namely, t-shirts, tank tops, caps, sweatshirts, beanies, jackets, golf shirts," in International

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Class 25.<sup>1</sup> Applicant also filed a second application to register the mark shown below, for the same identified goods in the respective classes<sup>2</sup>:



The Trademark Examining Attorney in each case refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the registered mark shown below, for goods identified as "books, printed journals and printed newsletters, all in the field of self help, motivation and holistic topics; blank cards; greeting cards; postcards; posters; stickers; calendars; writing paper; notepaper; wedding

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<sup>1</sup> Serial No. 77493208, filed June 6, 2008, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), alleging a *bona fide* intent to use in commerce, and disclaiming the exclusive right to use "KIDS" apart from the mark as shown.

<sup>2</sup> Serial No. 77492885, filed June 6, 2008, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. §1051(b), alleging a *bona fide* intent to use in commerce, and disclaiming the exclusive right to use "KIDS" apart from the mark as shown. The colors orange, yellow, blue and black are claimed as a feature of the mark.

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albums; scrapbook albums; photograph albums," in International Class 16, that when used on or in connection with applicant's goods, it is likely to cause confusion or mistake or to deceive:<sup>3</sup>



Upon final refusal of registration in each case, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. Because we deem the cases to have common questions of fact and of law, we have consolidated them. For the reasons discussed herein, the Board affirms the refusal to register as to the goods identified in International Class 16.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also, In re*

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<sup>3</sup>Registration No. 3159638, issued October 17, 2006, based on first use and first use in commerce on September 30, 2004. The refusal based on this registration pertains to Class 16 only. The examining attorney also refused registration as to Class 25 based on a different registration, Registration No. 2272172. However, during the pendency of this appeal, that registration was cancelled for failure to file a Section 8 affidavit of continuing use. Accordingly, the refusal as to Class 25 based on Registration No. 2272172 is moot and will be given no further consideration.

*Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks").

#### The Goods

There is clear overlap between at least two of the goods in the cited registration with those in Class 16 of the applications. The applications identify, among other goods, "stationery and writing materials," which would include registrant's "writing paper." Also, applicant's "notebooks" would include or contain registrant's "notepaper." Accordingly, these two groups of goods are legally identical.

Furthermore, the examining attorney submitted copies of use-based, third-party registrations covering goods of the type recited in Class 16 in both applications and the cited registration. Use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d

1783, 1785 (TTAB 1993). The examining attorney also submitted evidence from several third-party websites showing that both types of products are offered for sale under the same marks, to further emphasize this point.<sup>4</sup>

Accordingly, we find that the goods in the cited registration are in-part legally identical to those in Class 16 in the applications and otherwise related, and we find that this *du Pont* factor strongly favors finding a likelihood of confusion.

The Channels of Trade and Classes of Purchasers

Because registrant's goods and applicant's Class 16 goods as identified in the applications and the cited registration are in-part legally identical, we presume that the respective goods are or will be sold in the same trade channels and to the same classes of purchasers. *Brown Shoe Co. v. Robbins*, 90 USPQ2d 1752 (TTAB 2009); *Genesco Inc. v. Martz*, 66 USPQ2d 1260 (TTAB 2003); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). That is to say, there is nothing to stop a consumer who seeks registrant's "writing paper" from encountering applicant's "stationery and writing materials" on the very same store

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<sup>4</sup> Applicant pointed out that several of the goods in the cited registration are limited to "the field of self help, motivation and holistic topics." However, only three of the goods are so limited, specifically the "books, printed journals and printed newsletters." Our finding of relatedness regards other goods in the class.

shelves, online arenas, or elsewhere. Accordingly, we find that these *du Pont* factors also weigh in favor of finding a likelihood of confusion.

The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties.

*Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

We note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

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The mark in application Serial No. 77493208 is RIPPLE KIDS in standard character format, with the descriptive term "KIDS" disclaimed. Descriptive matter is generally viewed as a less dominant or significant feature of a mark. *In re National Data Corp.*, 753 F.2d 1956, 224 USPQ 749 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'"). Accordingly, we consider "RIPPLE," as the leading and nondescriptive word, to be the dominant term in the mark.

The mark in Application Serial No. 77492885 is as follows:



Again, "KIDS" is disclaimed, rendering RIPPLE the dominant term, which is further emphasized by a design that evokes ripples circling outward. Likewise, the mark in the cited registration contains the single word RIPPLE, with a similarly simplistic design of a few ripples circling outward, as follows:



Accordingly, we deem the commercial impressions of the designs of ripples, and in particular of outwardly circling ripples to be highly similar.<sup>5</sup>

Overall, we find that, viewed in their entireties, the similarities of the marks outweigh their differences. Accordingly, we find this *du Pont* factor to also favor finding a likelihood of confusion.

Consumer Sophistication and Existence of Third-Party Marks

Applicant submits that consumer sophistication should weigh in its favor. However, applicant has submitted no evidence that consumers of the goods at issue in the applications and the cited registration would be sophisticated. Rather, these goods would be purchased by ordinary consumers, and we note evidence of record that "stationery," as identified by the applications, is offered for sale for less than two dollars. See *www.papyrus.com* and *www.finestationery.com*. Inexpensive, ordinary consumer items are likely to be purchased on impulse, without a great deal of care, which increases the risk of

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<sup>5</sup> With regard to the standard character mark in Application Serial No. 77492885, the analysis is that much more clear since applicant's mark may be presented in various styles, including the font style used by registrant.



confusion. See *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000). This *du Pont* factor favors a finding of likelihood of confusion.

Applicant also referred in its brief to "a number of third-party registrations that contain the word 'Ripple' or 'Kids' within a mark that offer similar goods" in this class. (Appl's brief at 13). However, applicant failed to substantiate that argument with any evidence in the record.

We deem this *du Pont* factor to be neutral.

#### Actual Confusion

Applicant argues that the lack of actual confusion should weigh in its favor. However, the lack of evidence of "actual confusion" carries little weight, especially in an *ex parte* context. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) This is particularly so where, as here, applicant has an intent-to-use application and there has not yet been an opportunity for confusion to occur. We deem this *du Pont* factor to be neutral.

#### Conclusion

In summary, we have carefully considered all of the evidence and arguments of record relevant to the *du Pont* likelihood of confusion factors. We conclude that applicant and registrant here have in-part identical, and otherwise related, goods moving in the same channels of trade to the same purchasers, and similar marks, both dominated by the commercial impression of "RIPPLE". Accordingly, on the balance, we find a

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likelihood of confusion between applicant's marks and  
Registration No. 3159638 as to the goods in International Class  
16 only.

**Decision:** The refusal to register is affirmed as to  
International Class 16 in both applications. The applications  
will proceed to publication as to Class 25.